Supreme Court, U. S.
FILED
JUL 28 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM 1978.

No. 78-165

GEORGIA MAE DOWNS,
PETITIONER

v.

ROBERTA SAWTELLE, DAVIS GOODINE, DR. JOHN B. CURTIS, MILO COMMUNITY HOSPITAL, MARILYN B. DOW, MARY LOU PATTISON, RUTH A. HAGAN, CARL CARLSON AND AVA STROUT,
RESPONDENTS

Cross-Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit.

STEPHEN D. CLAPP
DOUGLAS A. CLAPP
MICHAEL J. CUNNIFF
ARMSTRONG, POLLIS AND CLAPP
52 North Washington Street
North Attleborough, Massachusetts 02760
Attorneys for Petitioner

ADDISON C. GETCHELL & SON, INC., THE LAWYERS' PRINTER, BOSTON

Table of Contents.

Opinions below 2

Jurisdiction 2

Question presented 2

Statutes involved 2

Statement of the case 3

Reasons relied on for allowance of the writ 7

I. The decision by the Court of the question presented will give needed guidance to the lower federal courts as to whether and under what conditions non-racial classes are protected by 42 U.S.C. § 1985(3) 7

II. This case is an appropriate opportunity for supplying the answer to the question raised in *Griffin* because the class asserted and the rights infringed are those which would merit special protection under an equal protection analysis 11

Conclusion 19

Table of Authorities Cited.

Cases.

Action v. Gannon, 450 F. 2d 1227 (8th Cir. 1971) 9

Adickes v. S. H. Kress & Co., 398 U.S. 144 (1970) 9

Alexier v. Matzke, 151 Mich. 36, 115 N.W. 251 (1908) 13

Bellamy v. Mason's Stores Inc., 508 F. 2d 504 (4th Cir. 1974) 9

Bricker v. Crane, 468 F. 2d 1228 (1st Cir. 1972), cert. den. 410 U.S. 930 (1973) 12

Brown v. Brown, 3 Conn. 299, 8 Am. Dec. 187 (1820) 13

Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) 9

Cameron v. Brock, 473 F. 2d 608 (6th Cir. 1973) 11

Carey v. Population Services International, 431 U.S. 678 (1977) 16-17

Cohen v. Illinois Institute of Technology, 524 F. 2d 818 (9th Cir. 1975) 9, 10

Collins v. Trotter, 81 Mo. 275 (1883) 13

Frontiero v. Richardson, 411 U.S. 677 (1973) 15

Glasson v. City of Louisville, 518 F. 2d 899 (6th Cir. 1975), cert. den. 423 U.S. 930 (1975) 8

Graham v. Richardson, 403 U.S. 365 (1970) 15

Griffin v. Breckenridge, 403 U.S. 88 (1971) 8, 9, 10, 11

Harrison v. Brooks, 519 F. 2d 1358 (1st Cir. 1975) 12

Hughes v. Ranger Fuel Corp., 467 F. 2d 6 (4th Cir. 1972) 11

Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974) 9

Jacobson v. Industrial Foundation of Permian Basin, 456 F. 2d 258 (5th Cir. 1972) 11

Loving v. Virginia, 388 U.S. 1 (1967) 15

Marlowe v. Fisher Body, 489 F. 2d 1057 (6th Cir. 1973) 8

McLaughlin v. Florida, 379 U.S. 184 (1964) 15

McLellan v. Mississippi Power & Light Company, 545 F. 2d 919 (5th Cir. 1977) 9, 10

Means v. Wilson, 522 F. 2d 833 (8th Cir. 1975), cert. den. 424 U.S. 958 (1976) 8

Murphy v. Mount Carmel High School, 543 F. 2d 1189 (4th Cir. 1976) 9

O'Neil v. Grayson County War Memorial Hospital, 472 F. 2d 1140 (6th Cir. 1973) 11-12

Oyama v. California, 332 U.S. 633 (1948) 15

Richardson v. Miller, 446 F. 2d 1247 (3d Cir. 1971) 8

Roe v. Wade, 410 U.S. 113 (1973) 17

San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973) 15

Takahashi v. Fish and Game Commission, 334 U.S. 410 (1947) 15

Ward v. St. Anthony Hospital, 476 F. 2d 671 (10th Cir. 1973) 12

Weber v. Aetha Casualty & Surety Co., 406 U.S. 164 (1972) 15

Weise v. Syracause University, 522 F. 2d 397 (2d Cir. 1975) 8, 10

Westberry v. Gilman Paper Co., 507 F. 2d 206 (5th Cir. 1975 (opinion withdrawn 507 F. 2d at 216) 8, 9, 10

Zablocki v. Redhail, 46 U.S. L.W. 4903 (1978) 16, 17

CONSTITUTIONAL PROVISIONS AND STATUTES.

United States Constitution, Thirteenth Amendment 8

Fourteenth Amendment 2, 7, 9, 15

28 U.S.C. § 1254(1) 2

§ 1343 3

42 U.S.C. § 1983 3, 6, 7

§ 1985(3) 1, 2, 3, 6, 7, 8, 9, 10, 11, 12, 14, 17

17 Stat. 13, § 2 (Ku Klux Act of 1871) 7, 14

MISCELLANEOUS.

Bible, Matthew 9:32 12n.

2 W. Blackstone, Commentaries on the Law of England, 497 (1807) 13

Brugdorf & Brugdorf, A History of Unequal Treatment; The Qualifications of Handicapped Persons as a "Suspect Class" under the Equal Protection Clause, 15 Santa Clara Law Rev. 855 (1975) 12n., 14n.

Brugdorf & Brugdorf, The Wicked Witch Is Almost Dead: Buck v. Bell and the Sterilization of Handicapped Persons, 50 Temple L. Q. 955 (1977) 14n.

J. Godolphin, The Orphan's Legacy, (London 1701) 13

S. Greenleaf, A Treatise on the Law of Evidence, § 336 (1866) 13

B. Ianaconi, Historical Overview: From Charity to Rights, 50 Temple L. Q. 953 (1977) 13n.

1 D. Perkins, A Treatise on the Law of Executors and Administrators, 21 (1877) 13

H. Swinburne, A Brief Treatise of Testaments and Lost Wills, 90 (London 1635) 13

IN THE

Supreme Court of the United States.

OCTOBER TERM 1978.

No.

GEORGIA MAE DOWNS,
PETITIONER
v.
ROBERTA SAWTELLE, DAVIS GOODINE, DR. JOHN B. CURTIS, MILO COMMUNITY HOSPITAL, MARILYN B. DOW, MARY LOU PATTISON, RUTH A. HAGAN, CARL CARLSON AND AVA STROUT,
RESPONDENTS

Cross-Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit.

The Petitioner prays that a writ of certiorari issue to review the decision of the court below holding that the Petitioner's 42 U.S.C. § 1985(3) claim was properly dismissed against all Respondents. The Petitioner further prays that the writ issue only in the event that the Court grants a writ of certiorari in No. 77-1842 or a writ of certiorari to be applied for by Milo Community Hospital.

Opinions Below.

The opinion of the United States Court of Appeals for the First Circuit is reported at 574 F. 2d 1, and is reprinted in the Appendix to Petition No. 77-1842, pages 13-41.

The bench ruling of the United States District Court for the District of Maine granting partial summary judgment to the Respondents is reprinted in the Appendix to Cross-Petition, pages 1-7.

Jurisdiction.

The judgment of the Court of Appeals was entered on March 30, 1978 (Cert. App. 42). The Respondents, Hagan, Dow, Pattison, and Curtis themselves filed a petition for writ of certiorari, No. 77-1842, on June 27, 1978 received by the Petitioner Downs on June 29, 1978. The Respondent Milo Community Hospital applied for and received an order of the Court dated June 15, 1978 extending the time in which to file a petition for writ of certiorari to and including July 28, 1978. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

Question Presented.

Do the deaf constitute a class for the purposes of 42 U.S.C. § 1985(3) where the deaf Petitioner's fundamental constitutional rights were deprived by a conspiracy motivated by her class traits?

Statutes Involved.

This case involves the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1985(3) both

of which are reprinted in the Appendix to Cross-Petition pages 8-10.

Statement of the Case.

This is an action commenced by the Petitioner in March, 1975, in the United States District Court for the District of Maine under 42 U.S.C. §§ 1983 and 1985(3). Jurisdiction in the district court was predicated on 28 U.S.C. § 1343. The complaint alleges that the Respondents in conspiracy with each other deprived the Petitioner of her constitutional rights by preventing her from marrying the person of her choice at the time of her choice, removing her child from her care and arranging for and performing a medical operation of sterilization upon her, all because she is deaf with a limited physical ability to orally communicate and all without her consent. The Respondents are the Petitioner's sister, Roberta Sawtelle; the Petitioner's father, Davis Goodine; Dr. John B. Curtis, the Chief of Staff of the Milo Community Hospital; Marilyn B. Dow, Mary L. Pattison, and Ruth A. Hagan, social workers of the Maine Department of Health and Welfare; Carl Carlson, the Milo, Maine town manager; the Milo Community Hospital; and Ava Strout, the hospital administrator.

The Petitioner has been deaf since the age of 3. She was educated at the Governor Baxter School for the deaf where she learned American Sign Language. Her English reading comprehension is at the fourth grade level. She is not retarded. After graduating from the Baxter School at the age of 18, the Petitioner returned to her home town of Milo, Maine to live.

At age 19, the Petitioner became pregnant and made plans with a young man to marry. However, her father, Davis Goodine, refused to permit the marriage. After

the baby was born, the Petitioner cared for it until Davis Goodine placed it with his girlfriend and obtained legal custody. After unsuccessful attempts at contraception, the Petitioner again became pregnant at the age of 21.

The Petitioner met her husband, Carroll Downs, in the fall of 1972. They became engaged and began making arrangements for a November, 1972 wedding. Although Downs was not the father of the child the Petitioner was carrying, he intended to keep it after the marriage and he wanted it to bear his name.

After Davis Goodine contacted the Maine Department of Health and Welfare for assistance for the Petitioner, Mrs. Dow, a social worker, recommended that he obtain guardianship over the Petitioner so that he could gain control over her so that she could be sterilized. Mrs. Dow contacted Dr. Curtis about medical preparations for the sterilization and arranged to have the town of Milo assume the expenses.

Davis Goodine applied to the Probate Court for guardianship over the Petitioner. However, the Respondent, Roberta Sawtelle, with the backing of Mrs. Dow opposed her father's application and sought appointment herself as the Petitioner's spendthrift guardian with a view toward surrendering the child for adoption. Long before anyone was appointed guardian, Dow and Sawtelle were aware that the existence of a husband could impede efforts to have the child adopted and they agreed that Sawtelle would persuade the Petitioner and Downs that Sawtelle's consent to the marriage was required and that Sawtelle would withhold her consent until after the baby's birth.

Dow knew that the Petitioner was easily influenced. She also knew that although Sawtelle seemed to be able to communicate with the Petitioner, Sawtelle was never sure that the Petitioner understood what she was saying.

As the pregnancy progressed, sterilization was proposed to the Petitioner by Dr. Curtis and Sawtelle. The Petitioner told the doctor that she did not want the operation and that she and her fiance wanted additional children. Although the Petitioner expressed her family plans to the doctor in a letter, the doctor treated it lightly and did not attach much importance to it. On the evening before the operation, both the Petitioner and her fiance told the doctor that she did not want the operation, but the doctor replied that Downs could not stop him.

Milo Community Hospital policy permitted sterilization in any of six circumstances. The only one which might have even arguably applied was mental retardation. However, Dr. Curtis testified that he did not consider the Petitioner mentally retarded. Yet Dr. Curtis' hospital report recommended sterilization "based 90% on this girl's low mentality involving poor judgment and her lack of restraint on sex appetite and its consequences." In another entry in the hospital report, Dr. Curtis stated that the operation had been "sanctioned by the health and welfare department." Although it was the policy of the Milo Community Hospital to require the patient to sign a standardized sterilization consent form, no one approached the Petitioner to sign it, even though the Petitioner's signature had been obtained on other minor hospital forms. Dr. Curtis testified that the form could have been explained to the Petitioner. Instead of the Petitioner, her spendthrift guardian, Sawtelle, signed the form. Dr. Curtis testified that he relied upon the guardian's consent, although he had never before done so.

On March 20, 1973, the Petitioner gave birth to a baby boy, Robert Scott Goodine. Four days later, she was sterilized by means of fallotomy. The Petitioner was not permitted to see her baby, despite her requests to do so. The

child was removed from the hospital by the Respondent, Pattison, and placed in a foster home.

Before the child was born, the Maine Attorney General had advised the social workers that the Petitioner's guardian could not consent to adoption, that only the natural parent could. The child was removed from the hospital by Pattison after the spendthrift guardian, rather than the Petitioner, signed an Agreement of Responsibility for Temporary Care of the baby.

The Petitioner married Carroll Downs shortly after she was released from the hospital. The spendthrift guardianship was dissolved and the custody of Robert was restored to her 19 months after his birth.

Prior to trial the Respondents, other than Roberta Sawtelle, moved for summary judgment which the district court granted as to the 42 U.S.C. § 1985(3) claim in favor of all the Respondents. Summary judgment was also granted as to the 42 U.S.C. § 1983 claim in favor of the Respondents Carlson, Milo Community Hospital and Strout. During a jury trial before the district court at the close of the Petitioner's case, the district court granted motions for directed verdict in favor of the remaining Respondents. On March 29, 1977, the district court entered judgment for the Respondents Dow, Hagan, Pattison, Curtis, Goodine and Sawtelle. On April 26, 1977, the district court amended its judgment to include all of the Respondents.

On April 28, 1977, the Petitioner filed a Notice of Appeal to the First Circuit Court of Appeals. The court of appeals reversed summary judgment granted to Milo Community Hospital on the § 1983 claim; reversed the directed verdict granted to Sawtelle, Dow, Hagan and Pattison and reversed that part of the directed verdict granted to Curtis relating to the sterilization. The court

of appeals affirmed the summary judgment granted to all the Respondents on the § 1985(3) claim; affirmed the summary judgment granted to Ava Strout and Carl Carlson on the § 1983 claim; affirmed the directed verdict granted to Davis Goodine; and affirmed so much of Dr. Curtis' directed verdict as related to interference with the Petitioner's right to marry and right to the care of her child.

The Respondents Dow, Hagan, Pattison and Curtis have filed a petition for writ of certiorari, No. 77-1842, and the Respondent Milo Community Hospital was, on June 15, 1978, granted an extension to file its petition for writ of certiorari on or before July 28, 1978.

Petitioner now seeks a writ of certiorari to be granted only if the Court grants any writ of certiorari requested by any of the Respondents. The Petitioner seeks a review of the decision of the court of appeals affirming the district court's grant of summary judgment on the § 1985 (3) claim.

Reasons Relied On for Allowance of the Writ.

I. The Decision by the Court of the Question Presented Will Give Needed Guidance to the Lower Federal Courts as to Whether and under What Conditions Non-Racial Classes Are Protected by 42 U.S.C. § 1985(3).

The provisions of 42 U.S.C. § 1985(3) afford a civil action for damages against persons engaging in conspiracies arising from an invidiously discriminatory motivation. The statute does not by its terms require state action, even though it is derived from § 2 of the Ku Klux Act of 1871, 17 Stat. 13, passed to enforce the Fourteenth Amendment. The Court has held that the presence of state action is not a necessary ingredient of a § 1985(3)

claim based on a purely private conspiracy to deny the right to travel on the basis of race. The Court held that Congress was empowered to reach such private conspiracies pursuant to the Enforcement Clause (§ 2) of the Thirteenth Amendment and under Congress' power to protect the fundamental right of interstate travel, neither of which embody a state-action limitation, *Griffin v. Breckenridge*, 403 U.S. 88(1971).

The Court held that § 1985(3) requires "that there must be some racial or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirator's action." *Griffin v. Breckenridge, supra,* at 102. Since racial discrimination was involved in *Griffin,* the Court noted that it was unnecessary to determine whether conspiracies motivated by a discriminatory animus other than racial bias were actionable. Since *Griffin,* the lower federal courts have struggled with the unanswered question.

The class based invidiously discriminatory animus requirement has been found by lower federal courts to have been satisfied by allegations of conspiracies based on discrimination against: supporters of a political candidate, *Richardson v. Miller,* 446 F. 2d 1247 (3d Cir. 1971); *Glasson v. City of Louisville,* 518 F. 2d 899 (6th Cir. 1975), *cert. den.* 423 U.S. 930 (1975); *Means v. Wilson,* 522 F. 2d 833 (8th Cir. 1975), *cert. den.* 424 U.S. 958 (1976); religious groups, *Marlowe v. Fisher Body,* 489 F. 2d 1057 (6th Cir. 1973); supporters of environmental causes, *Westberry v. Gilman Paper Co.,* 507 F. 2d 206 (5th Cir. 1975) (opinion withdrawn 507 F. 2d at 216); and women, *Weise v. Syracuse University,* 522 F. 2d 397 (2d Cir. 1975).

The greatest controversy among the lower federal courts and one reason for differing results in seemingly similar cases is whether § 1985(3) gives a cause of action for private conspiracies to deprive others of rights flowing

only from the Fourteenth Amendment. Some courts have held that the § 1985(3) action lies without the presence of state action; that Congress, under the Enforcement Clause (§ 5) of the Fourteenth Amendment properly may reach private conspiracies against rights secured only by that Amendment. *Westberry v. Gilman Paper Co., supra; Action v. Gannon,* 450 F. 2d 1227 (8th Cir. 1971). Other courts have reached a contrary conclusion. *Bellamy v. Mason's Stores Inc.,* 508 F. 2d 504 (4th Cir. 1974); *Cohen v. Illinois Institute of Technology,* 524 F. 2d 818 (9th Cir. 1975); *Murphy v. Mount Carmel High School,* 543 F. 2d 1189 (4th Cir. 1976). The fifth circuit has theorized that private conduct might be reached through the power of the Fourteenth Amendment, but only if the conduct amounts to an independent violation of law. *McLellan v. Mississippi Power & Light Company,* 545 F. 2d 919 (5th Cir. 1977).

The facts in the instant case avoid a direct confrontation with these issues because the conduct amounts to an assault and battery and because the conspiracy involved here is not purely private. The social worker Respondents who were acting in their capacities as employees of the State of Maine Department of Health and Welfare were at the center of the conspiracy thereby making the deprivations state action. *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 162-69 (1970). The deprivations were also state action under the *Burton v. Wilmington Parking Authority,* 365 U.S. 715 (1961) and *Jackson v. Metropolitan Edison Co.,* 419 U.S. 345 (1974) reasoning contained in the opinion of the court of appeals (Cert. App. 19-28).

However, the question left unanswered in *Griffin,* whether § 1985(3) protects non-racial classes, still haunts the lower federal courts which have displayed a reluctance to tread upon the ground reserved by the Court. The Court's reservation of this question is evident from the concern expressed in *Griffin* over the broad literal

sweep of § 1985(3), *Griffin v. Breckenridge, supra,* at 102, and the express notation that since racial discrimination was involved the non-racial coverage of the statute was not decided. *Id.* at n. 9. This open question has resulted in considerable uncertainty and controversy in the circuits. Beyond the differing results reached in similar cases in different circuits, *Weise v. Syracuse University,* 522 F. 2d 397 (2d Cir. 1975); *Cohen v. Illinois Institute of Technology,* 524 F. 2d 818 (9th Cir. 1975), disagreement and uncertainty even exist within the same circuit.

In *Westberry v. Gilman Paper Company,* 507 F. 2d 206 (5th Cir. 1975) the fifth circuit, when presented with the question of whether the supporters of environmental causes were a class for § 1985(3) purposes, first issued an opinion that the class was protected. However, on rehearing on the stated grounds of mootness the opinion was withdrawn "so that it will spawn no legal precedents" 507 F. 2d at 216. More recently, the fifth circuit had occasion to reverse *en banc* another one of its panel majority opinions which had held that employees of a public utility who were fired for the reason that they had filed voluntary petitions in bankruptcy were members of a class protected by § 1985(3). *McLellan v. Mississippi Power & Light Co.*,545 F. 2d 919 (5th Cir. 1977). In spite of the two prior panel majority decisions to the contrary, the *en banc* opinion stated "[t]his circuit has not heretofore found it necessary to decide whether Congress intended that *only* racial bias would activate section 1985(3)." *Id.* at 929.

The resolution of the uncertainty in the lower federal courts concerning whether and to what extent non-racial classes are protected by § 1985(3) can be eliminated only by the Court's decision of a case such as this where non-racial discrimination is involved.

Although the question presented by this case is of importance beyond the private interests of the litigants, the Petitioner believes that the decision of the court of appeals as a whole provides her with an adequate opportunity for the vindication of her fundamental rights. For this reason, the Petitioner desires the grant of this conditional cross-petition only in the event that the Court determines to grant the petition of one of the other parties.

II. THIS CASE IS AN APPROPRIATE OPPORTUNITY FOR SUPPLYING THE ANSWER TO THE QUESTION RAISED IN *Griffin* BECAUSE THE CLASS ASSERTED AND THE RIGHTS INFRINGED ARE THOSE WHICH WOULD MERIT SPECIAL PROTECTION UNDER AN EQUAL PROTECTION ANALYSIS.

Griffin established that the Congressional purpose behind § 1985(3) was to make actionable those conspiracies arising from an "invidiously discriminatory motivation":

> The language requiring intent to deprive of *equal* protection, or *equal* privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action. *Griffin v. Breckenridge,* 403 U.S. 88, 102 (1971).

In dealing with § 1985(3) allegations where race discrimination is not involved, various tests of class sufficiency have been employed by the lower federal courts. The class must be "clearly defined." *Cameron v. Brock,* 473 F. 2d 608 (6th Cir. 1973); *Jacobson v. Industrial Foundation of Permian Basin,* 456 F. 2d 258 (5th Cir. 1972). The conduct must have been directed at the plaintiff because of his class membership rather than his individual or personal traits. *Hughes v. Ranger Fuel Corp.,* 467 F. 2d 6 (4th Cir. 1972); *O'Neil v. Grayson County*

War Memorial Hospital, 472 F. 2d 1140 (6th Cir. 1973); *Ward v. St. Anthony Hospital*, 476 F. 2d 671 (10th Cir. 1973). The class cannot be "novel" and must be "readily recognizable." *Bricker v. Crane*, 468 F. 2d 1228 (1st Cir. 1972), *cert. den.* 410 U.S. 930 (1973) The class must be defined by invidious criteria. *Harrison v. Brooks*, 519 F. 2d 1358 (1st Cir. 1975).

The deaf are a class. That class is neither contrived nor imaginary. It and its members are readily recognizable both perceptually by the general population and scientifically by medical testing. However, to say that the deaf are a class is not to say that the deaf are one of the classes protected by § 1985(3).

As a class repeatedly abused and neglected by society and government, the deaf have a legitimate claim for the special protection of § 1985(3). Discrimination against the deaf dates back to ancient times. The Athenians put deaf children to death as a regular practice.[1] Inhumane and discriminatory treatment of persons with physical and mental disabilities continued through the Middle Ages. If not imprisoned they were driven from the cities to wander aimlessly through rural areas.[2] One of the reasons for such treatment was that the physical and mental disabilities were thought to be linked to demonic powers. The New Testament reveals how Christ worked a cure by casting out demons from a "dumb demonic."[3]

More recent stereotypes concerning the physically handicapped still persist. There is the notion that they are incapable of being productive members of society and are permanently dependent upon the charity of others. This

---

[1] Brugdorf & Brugdorf, *A History of Unequal Treatment; The Qualifications of Handicapped Persons as a "Suspect Class" Under the Equal Protection Clause*, 15 Santa Clara Law Rev. 855, 844 (1975).

[2] *Id.*

[3] *Matthew*, 9:32.

notion is traced back to the English Poor Law system where there was a conclusive presumption that people with virtually any disability belong in the ranks of the indigent dependent.[4]

The traditionally limited right of the deaf to live in the world is also evidenced by the old common law rule that the capacity of a deaf mute to make a contract was restricted by the rebuttable presumption of incompetence. The lack of hearing and speech was *prima facie* rebuttable evidence of incapacity while lack of sight, hearing and speech raised an irrebuttable presumption of incapacity. *Brown v. Brown,* 3 Conn. 299, 8 Am. Dec. 187 (1820). In the case of *Alexier v. Matzke,* 151 Mich. 36, 115 N.W. 251 (1908) it was held that a deaf mute is capable of entering into a contract if it is shown that he had sufficient mental capacity. Deaf mutes were held to be *prima facie* incapable of making any contract and the burden of proving compentency was on the party asserting it. *Collins v. Trotter,* 81 Mo. 275 (1883).

In the field of evidence the presumption was that persons deaf and dumb from birth were idiots and the burden of proving sufficient understanding was upon the party presenting the witness. *S. Greenleaf, A Treatise on the Law of Evidence,* § 336 (1866). Likewise a similar presumption limited the deaf person's right to make a will. Persons who were born deaf, dumb and blind were thought to lack the "common inlets of understanding" and therefore were incapable of having testamentary capacity. 2 *W. Blackstone, Commentaries on the Law of England,* 497 (1807). The deaf mute on the other hand was only rebuttably presumed to be an idiot. *J. Godolphin, The Orphan's Legacy,* 34 (London 1701); 1 *D. Perkins, A Treatise on the Law of Executors and Administrators,* 21 (1877); *H. Swinburne, A Brief Treatise of Testaments and Last Wills,* 90 (London 1635).

[4] B. Ianaconi, *Historical Overview: From Charity to Rights,* 50 Temple L.Q. 953, 953 (1977).

In 1647 Massachusetts established the first public school system. Soon thereafter other colonies also established school systems supported by the colonial governments.[5] Deaf and other physically handicapped children were not suited to the usual teaching methods and therefore caused extra work for the teacher. These children, viewed as disruptive and burdensome, were effectively excluded from the public school system.[6] It was not until the 1860's that public special education classes for deaf children were initiated in this country.[7]

The Social Darwinism of the late 1800's gave rise to an eugenics movement which reached its peak in the United States in the 1920's. The movement was accompanied by the widespread belief that the prevalence of mental and physical disabilities was the root of almost all social problems.[8] In 1907, Indiana enacted the nation's first sterilization law which applied to inmates of state institutions who were confirmed criminals, idiots, imbeciles or rapists. By 1930, twenty-eight states had enacted similar statutes.[9] In 1922 eugenicists published a Model Eugenic Sterilization Law which proposed to eliminate a broad range of defects. The law provided for the sterilization of, among others, persons who were deaf and those with seriously impaired hearing.[10]

Since § 1985(3) derives from the Klu Klux Act of April 20, 1871, 17 Stat. 13 which was entitled "An Act to

---

[5] *Brugdorf,* 15 Santa Clara Law Rev. *supra* at 870.

[6] *Id.* at 871-872.

[7] *Id.* at 872.

[8] Brugdorf & Brugdorf, *The Wicked Witch is Almost Dead: Buck v. Bell and the Sterilization of Handicapped Persons,* 50 Temple L.Q. 955, 997 (1977).

[9] *Id.* at 1000.

[10] *Id.*

enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes", and since it, like the Fourteenth Amendment, uses the words "equal protection", an analysis of which classes are properly within its purview should be consistent with the analysis employed in determining which classes are "suspect classes" enjoying special protection under the equal protection clause of the Fourteenth Amendment.

The Court has indicated that when legislative classifications focus upon certain group traits that a "compelling state interest" analysis will be applied to the legislative classifications: classification based on race, *Loving v. Virginia,* 388 U.S. 1 (1967); *McLaughlin v. Florida,* 379 U.S. 184 (1964); classification based on alienage, *Takahashi v. Fish and Game Commission,* 334 U.S. 410 (1947); *Graham v. Rodriguez,* 411 U.S. 1 (1973), the Court, in ruling that nationality, *Oyama v. California,* 332 U.S. 633 (1948); classification based on illegitimacy, *Weber v. Aetna Casualty & Surety Co.,* 406 U.S. 164 (1972). In a plurality opinion the Court in *Frontiero v. Richardson,* 411 U.S. 677 (1973) ruled that statutory classifications based on sex were inherently suspect.

In the case of *San Antonio Independent School District v. Rodriguez,* 411 U.S. 1 (1973), the Court, in ruling that the proposed class did not have the "traditional indicia of suspectness" stated:

> the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process. *Id.* at 28.

The deaf would constitute a suspect class under the Court's ruling in *Rodriguez,* if that class has been saddled

with disabilities or historically treated unequally or relegated to political powerlessness. Among the disabilities with which society saddles the deaf is the presumption of idiocy and stupidity which attaches as soon as it becomes apparent that the deaf person cannot speak and cannot hear. The deaf person is presumed dumb until proven otherwise.[11]

The unequal treatment of deaf people historically is a progression from ancient times when they were put to death, to the Middle Ages when they were excluded from communities, to colonial times when they were legally presumed to be incompetent and their education was neglected, to the present time when they are subjected to social rather than legal presumptions of incompetence. The political powerlessness of the deaf results from their minority status, their lack of integration into our society and the communication barriers which exist between the deaf and the majoritarian political process.

The court of appeals ruled that the Petitioner did not establish that her membership in the class of deaf persons was the cause of the alleged discrimination against her (Cert. App. 39). The Court in *Zablocki v. Redhail,* 46 U.S. L.W. 4903 (1978) reaffirmed that the right to marry is of fundamental importance. In categorizing the right to marry as part of the fundamental right of privacy, the Court quoted from *Carey v. Population Services International,* 431 U.S. 678 (1977):

> While the outer limits of [the right of personal privacy] have not been marked by the Court, it is clear that among the decisions that an individual may make without unjustified government interference are per-

[11] The existence of the present day stereotype is documented in the trial transcript of this case. During jury selection, one prospective juror candidly admitted to the district court that he held the opinion that all deaf mutes are retarded.

> sonal decisions "relating to marriage, *Loving v. Virginia,* 388 U.S. 1, 12 (1967); procreation, *Skinner v. Oklahoma,* 316 U.S. 535, 541-542 (1942); contraception, *Eisenstadt v. Baird,* 405 U.S. [438], at 453-454, id., at 460, 463-465, (White, J. concurring in result); family relationship, *Prince v. Massachusetts,* 321 U.S. 158, 166, (1944); and child rearing and education, *Pierce v. Society of Sisters,* 268 U.S. 510, 535 (1925); *Meyer v. Nebraska,* 262 U.S. 390, 399, (1923)." *Id.*, at 684-685, quoting *Roe v. Wade,* 410 U.S. 113, 152-153 (1973).

In concluding that the right to marry was a fundamental right, the Court applied the "critical examination" standard in evaluating the state interests advanced in support of the statutory regulation. *Zablocki v. Redhail, supra,* 46 U.S. L.W. at 4095. Consistent with the equal protection nature of the inquiry under § 1985(3), the state action complained of in the instant case must also be subjected to a more rigid examination than if some other non-fundamental right were at risk.

The Respondents could not be expected to admit that their actions toward the Petitioner were motivated by their stereotyped preconceived notions concerning the unworthiness of deaf mutes. Their motivations must be proved through the circumstantial evidence of what they did. The court of appeals, after evaluating the evidence, found that one set of conclusions which could be drawn was that: the doctor took advantage of the Petitoner's difficulty in communicating and impressionable nature to manipulate her into consenting to the operation (Cert. App. 32); an evaluation of the doctor's conduct should properly take into consideration the extraordinary degree of helplessness of the Petitioner (Cert. App. 32); the doctor determined that sterilizing the Petitioner was for the good of society and

for this reason, he ignored indications from her that she did not consent (Cert. App. 31); the doctor accepted without dispute advisory reports from his colleagues that included non-medical conclusions of a speculative and prejudicial nature (Cert. App. 32); these reports were devoid of any medical analysis and contained conclusions such as "apparently lacks ability to curtail normal appetite for sex", that Petitioner's low economic earning power demonstrated "irresponsibility" and that she was "apparently retarded. Incapable of functioning in a maternal role" (Cert. App. 17); the doctor accepted the consent of Petitioner's guardian although he had never before accepted a guardian's consent (Cert. App. 18); the doctor knew that the Petitioner was not retarded yet he wrote in the hospital record that his recommendation of sterilization was "based 90% on this girl's low mentality involving poor judgment and lack of restraint on sex appetite and its consequences" (Cert. App. 17); and the doctor received a letter from the Petitioner expressing her wish to have additional children but he treated it lightly and did not attach importance to it (Cert. App. 17). The court of appeals drew an apt analogy between the doctor's motivation in sterilizing the Petitioner and the motivation of a discriminatory employer or educator who believes that minority group members are happier and more productive in a segregated environment (Cert. App. 31).

The court of appeals also found that the evidence permitted the conclusion that Dow and Sawtelle agreed to persuade the Petitioner and her fiance that Sawtelle's consent to their marriage was necessary and that the consent would be withheld until after the baby was born (Cert. App. 16). The record contains evidence that Mrs. Dow knew that the Petitioner did not understand everything Sawtelle said to her and that the Petitioner was easily influenced.

The doctor believed that the Petitioner would not be a worthy parent. This belief was founded upon her deaf muteness. Although he knew she was not retarded he could justify her sterilization by her "apparent retardation." Her apparent retardation was nothing more than the social stereotype in which deaf mutes are placed, their presumption of incompetence. The doctor, the social workers and Sawtelle each took advantage of the position of helplessness in which the Petitioner was placed by her deafness. They knowingly manipulated and deceived her in a way made possible only by her deafness.

Although the social workers had contact with each of the defendants in coordinating the sterilization, the delay of the marriage or the surrender of the child, at the nucleus of the conspiracy was Roberta Sawtelle "whose role in the operation and the taking of the plaintiff's child was played in concert with Dr. Curtis and the social workers" (Cert. App. 37).

Conclusion.

For the foregoing reasons it is respectfully submitted that, in the event the Court should grant the petition in No. 77-1842 or the petition of Milo Community Hospital, this petition for writ of certiorari should likewise be granted.

Respectfully submitted,

STEPHEN D. CLAPP
DOUGLAS A. CLAPP
MICHAEL J. CUNNIFF
ARMSTRONG, POLLIS AND CLAPP
52 North Washington Street
North Attleborough, Massachusetts 02760
Attorneys for Petitioner